

Moreover, the collocation issue has already been beaten to death. This Commission has consistently held³³ that its "two-mile, price parity rule" obviates the need for a competing ESP to have a physical presence in the BOCs' central offices.³⁴ Additionally, the Georgia PSC, in an order subsequent to the Georgia MemoryCall Order,

³³ See, e.g., Computer III, 104 FCC2d at 1037, ¶ 151; BOC ONA Order, 4 FCC Rcd 1, at ¶ 181-83. Even where this Commission initially adopted a mandatory physical collocation policy in the Expanded Interconnection proceeding, it recognized that such a requirement was not necessary to achieve technical comparability between a LEC's and its competitors' enhanced services:

We found [in the Computer III and Open Network Architecture proceedings] that voluntary BOC use of price parity rules, a form of virtual collocation, fully addressed the competitive needs demonstrated by enhanced service providers. . . . [T]he enhanced service equipment at issue in Computer III could readily be located outside the LEC central office and achieve technical comparability with LEC enhanced service equipment located inside the central office.

Expanded Interconnection With Local Telephone Company Facilities, 7 FCC Rcd 7369, at n.93 (1992), recon., 8 FCC Rcd 127 (1992), vacated in part and remanded sub nom. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

³⁴ This probably explains why the Commission, when alluding in the Notice to the Georgia PSC's decision, refrained from acknowledging that the collocation issue was among those addressed in that decision. See, Notice at ¶ 38.

specifically declined to adopt a collocation requirement as a component of its working definition of ONA.⁵⁵

Thus, any reliance on the Georgia MemoryCall Order's "finding" of discrimination in BellSouth's not permitting others to collocate in its central offices is seriously misplaced.

C. The "Timing of Unbundling" Issue

Like the two issues above, the "timing of unbundling" finding is unsupported by a fair reading of the record in the Georgia proceeding. The "finding" is based on the application of a previously unarticulated service availability expectation, a mischaracterization of testimony from the hearing, and a misapplication of the FCC's CEI and ONA unbundling requirements. Thus, like the two issues before it, this "finding" provides no evidence of access discrimination by BellSouth in its MemoryCall service introduction.

⁵⁵ See, Review of Open Network Architecture (ONA), Docket No. 4018-U, released Sept, 29, 1993:

The Commission is thus satisfied that the concept of ONA as reflected in the ONA model is sufficient for our consideration of the tariff before us. . . . The record indicates that there are a number of pending dockets now before the FCC which may result in mandated interconnection, including full collocation. . . . Expansion of the definition of ONA should be deferred pending those proceedings.

Id., at 4-5.

First, this "finding" was based in part on the same type of analysis that supported the first "finding" above. Testimony that unbundled call forwarding features previously had been requested was viewed as sufficient to have obligated BellSouth to provide them, without consideration of whether there was any market demand to support such an offering. Not only is this concept untenable as a matter of prudent decisionmaking, but it also was a novel expression of the PSC's regulatory expectations.

Second, relying on the brief of an opposing party, the order misinterprets the testimony of BellSouth's witness, attributes the distorted meaning to him, and then criticizes him for it.⁵⁶ Thus, BellSouth is castigated for purportedly viewing ONA only as an obligation to make new unbundled services available when its own enhanced service uses them. When placed in its proper context, however, it is clear that the BellSouth witness's statement was simply an articulation of the CEI standard that is a component of this Commission's ONA framework.⁵⁷ Further, as the witness added, BellSouth

⁵⁶ See, Georgia MemoryCall Order, at n.20, citing the post hearing brief of Cox Enterprises, which quoted a small portion of BellSouth's witness's testimony: "ONA says when we use those services ourselves, we are required to make them available."

⁵⁷ See, e.g., Georgia MemoryCall Proceeding Transcript at 532:

The strict requirement of ONA, if you're familiar with our CEI plans and what we're asked to do, is that when we were going to offer any enhanced service, we
(continued...)

had already gone beyond the CEI obligation and had begun making the new features available across its region well in advance of any widespread MemoryCall service deployment.⁵⁸ For this, BellSouth was inexplicably chastised "because of what it may well signal with respect to [BellSouth's] purported commitment to a proper Open Network Architecture program."⁵⁹ Again, there is no basis for relying on this third "finding" as an indicator of likely access discrimination by any BOC.

* * * * *

⁵⁷(...continued)

had to make the services that our enhanced services were going to use [available] on the same terms and conditions to anybody else, which we've always done.

⁵⁸ Id. In fact, the witness had earlier testified to the same effect:

As far as ONA goes, you know, we are committed to deploying the ONA features regardless of what this Commission does with MemoryCall, so in some ways I see those as separate issues. It is true that MemoryCall does buy from the tariff certain ONA services like SMDI, just as anyone else could. But we have already filed and this Commission has already approved a number of ONA services, such as call forward busy line, don't answer, which y'all approved on a statewide basis in December of 1989. So ONA is really just a series of tariffs that provide new features that people have indicated that they wanted.

Id., at 461-62.

⁵⁹ Georgia MemoryCall Order, at 33.

In short, the MemoryCall decision should be viewed for what it is -- an anomalous order⁶⁰ reflecting the Georgia PSC's response, without the guidance of any previously adopted or enunciated rules or requirements of its own, to incumbent competitors' fears associated with BellSouth's attempt to introduce an innovative voice messaging service on a nonregulated basis. BellSouth complied with all known requirements for its service introduction and even went beyond them. As shown above and in the record of the Georgia proceeding, BellSouth did not engage in "access discrimination" in its introduction of MemoryCall service. Any attempts to rely on that decision as evidence of potential BOC abuses must be rejected.

⁶⁰ As the Georgia MemoryCall Order reflects, a number of other underlying issues also may have influenced both the nature and substance of that decision. For example, BellSouth and the Georgia PSC had been engaged in a long-running disagreement over the PSC's authority to compel BellSouth to submit to it competitively sensitive information, given the PSC's admitted position that it was not permitted to withhold any such submitted information from public disclosure under Georgia's open records laws. That disagreement is evident in the Order's discussion of BellSouth's submission of MemoryCall's underlying costs and cost structure. See, e.g., Georgia MemoryCall Order, at 41-42. This issue has since been resolved in BellSouth's favor in Georgia courts. Another underlying issue was a disagreement between BellSouth and the PSC with respect to the scope of the PSC's legal authority to regulate MemoryCall in the first instance, given the FCC's apparent preemption in Computer III of state regulation of enhanced services when MemoryCall was first introduced, and the subsequent disagreement over the jurisdictional nature of MemoryCall service following the California I decision. An appropriate appreciation of influences such as these, while not necessarily dispositive of the matter, is useful for placing the Georgia decision in its proper context and reading between the lines of the purported "findings."

FILL IN

40

RECEIVED

MAY 19 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY DUPLICATE

In the Matter of

Computer III Further Remand
Proceedings: Bell Operating
Company Provision of
Enhanced Services

CC Docket 95-20

REPLY COMMENTS

BELLSOUTH TELECOMMUNICATIONS, INC.
By its Attorneys

M. Robert Sutherland
A. Kirven Gilbert III

4300 Southern Bell Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 614-4897

Date: May 19, 1995

providing us with a staffing level that I believe is now sufficient to achieve our mission.²³

Opponents' use of outdated information should not be rewarded.

Opponents similarly attempt to portray regulatory proceedings in various states as further evidence of failure of the Commission's safeguards or, more generally, indicators of rampant unscrupulous behavior by the BOCs. As before, closer inspection reveals the distortion practiced by these parties.

BellSouth has already addressed in detail both the errors and mischaracterization of the Georgia PSC's "findings" of "access discrimination" in the Georgia MemoryCall Order.²⁴ As expected, opponents continued to distort that decision, as well as the Ninth's Circuit recognition of it.²⁵ Several went on to rehash, as well as

²³ See, "Statement of Reed E. Hundt, Chairman, Federal Communications Commission, on FY 1996 Budget Estimates" before the Subcommittee on Commerce, Justice, and State, the Judiciary and Related Agencies, Committee on Appropriations, U.S. House of Representatives, March 22, 1995, at p. 18.

²⁴ BellSouth at 32-50.

²⁵ See, e.g., ITAA at 18 ("Like the Georgia Public Service Commission, the [Ninth Circuit] found that BellSouth had discriminated against competing enhanced service providers") (emphasis added). Of course, the court made no such finding, and could have made no such finding, because no such question was presented to it. Further exemplifying ITAA's propensity to promote misunderstanding of plain language, ITAA similarly distorts the court's decision by restating the court's description of CEI "[i]n other words" that are totally at odds with the court's own words:

(continued...)

misrepresent, other aspects of that decision, that even the Ninth Circuit did not find worthy of reiteration.

In the most egregious case, MCI, in a statement as unequivocal as it is untrue, asserts that the Georgia PSC found that BellSouth was "using CPNI to identify particular customers of existing VMS competitors for 'targeted' marketing efforts."²⁴ Not surprisingly, MCI provided no citation to the Georgia PSC's Order to support its assertion. That is because, as a thorough review of the Order reveals, there is no such finding by the Georgia PSC.

²³(...continued)

In other words, CEI is designed to prevent access discrimination only when an enhanced service provider wishes to provide the exact same service in the exact same manner as the BOC.

ITAA at 17, n.28 (emphasis added). This interpretation was appended to ITAA's quotation of a portion of the court's decision which stated:

While CEI and the nondiscrimination reporting requirements are designed to prevent BOC discrimination against other enhanced service providers where a BOC is providing its own service, these safeguards do not enable enhanced service providers to pick and choose network service elements to design and develop enhanced services.

ITAA at 17, quoting California III, 39 F.3d at 939. Of course, nothing in this passage states, nor has this Commissioner ever proposed, that CEI is limited only to those circumstances suggested by ITAA, i.e., exact same enhanced services in the exact same manner. ITAA's attempts to place such a spin on the Ninth Circuit's decision must be rejected.

²⁴ MCI at 29.

Misrepresentations to the Commission of this type should not and need not be tolerated.²⁷

ATSI similarly asserts incorrectly that the Georgia PSC's conclusions in the MemoryCall case regarding BellSouth's use of CPNI, which was in accordance with the Commission's rules, warrants revision of those rules.²⁸ This argument is nonsense for two reasons. First, as ATSI begrudgingly acknowledged, the Ninth Circuit expressly upheld the Commission's rules and its preemption of conflicting state rules.²⁹ Second, even before the Ninth Circuit's decision, the Georgia PSC, in a proceeding that post-dated the MemoryCall decision, expressed its acceptance


²⁷ See e.g., 47 CFR Section 1.24. The same misrepresentation already has been perpetrated on the Ninth Circuit. See MCI Comments, Appendix A, which is an excerpt of the Reply Brief of Petitioners MCI Telecommunications Corporation in Case No. 92-70186, and Newspaper Association of America, in Case No. 92-70261, at 16 (September 8, 1993), People of the State of California v. FCC, No. 92-70083 and consolidated cases (Ninth Circuit).

²⁸ ATSI at 5.

²⁹ Id.

CERTIFICATE OF SERVICE

I do hereby certify that I have, this 23rd day of April, served all parties to this action with a copy of the foregoing **REPLY**, by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed on the attached distribution list:


Denise W. Tuttle

Distribution List
CC Docket Nos. 95-20 and 98-10

Office of the Secretary*
Federal Communications Commission
1919 M Street, N.W., Room 222
Stop Code 1170
Washington, D.C. 20554

International Transcription Services, Inc.*
1231 20th Street, N.W.
Washington, D.C. 20036

Janice Myles*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, Room 544
Washington, D.C. 20554

Frank Michael Panek
Ameritech
Room 4H84
2000 West Ameritech Center Drive
Hoffman Estates, Illinois 60196-1025

Jeffrey A. Brueggeman
U S West, Inc.
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

Lawrence W. Katz
Bell Atlantic Telephone Companies
1320 North Court House Road
8th Floor
Arlington, Virginia 22201

Robert J. Gryzmala
SBC Communications Inc.
One Bell Center, Room 3532
St. Louis, Missouri 63101

R. Michael Senkowski
Robert J. Butler
Kenneth J. Krisko
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Brian Conboy
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

David L. Sieradzki
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Richard S. Whitt
David N. Porter
1120 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036

Susan M. Miller
Vice President and General Counsel
Alliance for Telecommunications
Industry Solutions, Inc.
1200 G Street, N.W., Suite 500
Washington, D.C. 20005

Lawrence E. Sarjeant
United States Telephone Association
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005-2164

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

Michael J. Ettner
Senior Assistant General Counsel
Personal Property Division
General Services Administration
1800 F Street, N.W., Rm. 4002
Washington, D.C. 20405

Kevin DiLallo
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, N.W.
Suite 900
Washington, D.C. 20036

Richard J. Metzger
Association for
Local Telecommunications Services
888 17 Street, N.W., Suite 900
Washington, D.C. 20006

L.B. Golter
Western Regional Networks, Inc.
1000 North Ninth Street, Suite 5
Grand Junction, Colorado 81501

Paul Schumacher
General Counsel
Community Internet Systems, Inc.
P.O. Box 81
Columbus, Nebraska 68601-0081

Karen Johnson
Metro One Telecommunications, Inc.
8405 SW Nimbus Avenue
Beaverton, Oregon 97008

Randolph J. May
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404

Scott J. Robin, Esq.
Counsel for Helicon Online, L.P.
3 Lost Creek Drive
Selinsgrove, Pennsylvania 17870

Patrick H. Gaughan, J.D., M.B.A.
P.O. Box 3192
Oak Brook, Illinois 60522

Jonathan Jacob Nadler
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue
P.O. Box 407
Washington, D.C. 20044

Mark J. O'Connor
Piper & Marbury L.L.P.
Seventh Floor
1200 Nineteenth Street, N.W.
Washington, D.C. 20036

Russell Blau
William Fishman
Swidler & Berlin Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Steven Gorosh
Vice President and General Counsel
NorthPoint Communications, Inc.
222 Sutter Street
San Francisco, California 94108

Carl W. Hampe
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, N.W., Suite 1300
Washington, D.C. 20036

Mark A. Stachiw, Esq.
Vice President, Senior Counsel and Secretary
AirTouch Paging
Three Forest Plaza
12221 Merit Drive
Suite 800
Dallas, Texas 75251

Michelle W. Cohen
Paul, Hastings, Janofsky & Walker LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004

Ava B. Kleinman
AT&T Corp.
Room 3252J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Frank W. Krogh
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Christopher W. Savage
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006

* By Hand Delivery